ZAINAL ABIDIN JAWI

v.

MAT HASSAN ABDUL & ANOR.

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CIVIL SUIT NO. 477 OF 1983]
31 OCTOBER 1987

CIVIL PROCEDURE: *Summary judgment - In actions for specific performance involving property - RHC 1980 - Order 81 r. 1 - Whether there was a defence on the merits - Bona fide triable issue.*

LAND LAW: *Power of Attorney - 1st defendant, owner of land, empowered 2nd defendant with a Power of Attorney to deal with land - Power of donee to sell and execute conveyance instrument - Donee entered into Sale/Purchase Agreement to sell land to plaintiff - Sale not finalised despite repeated requests to the donee - Notice of action to donor to complete sale - Donor sold land to different purchaser - Plaintiff claims for specific performance against both donor and donee - Donor raised defence of "Non est factum" - When it is available.*

This was an application by the plaintiff for summary judgment pursuant to O. 81 r. 1 of the Rules of High Court on the ground that the defendants have no defence on the merits of the case.

The 1st defendant had empowered the 2nd defendant with a power of attorney to deal with a piece of land of which the 1st defendant was the registered owner which includes the power to sell and to execute any conveyancing instruments to effect the sale of the land.

The 2nd defendant acting as the attorney of the 1st defendant then entered into an agreement with the plaintiff selling to the plaintiff the land at a purchase price of RM10,034.15. Upon signing the agreement the plaintiff paid RM5,000 as part payment of the purchase price in compliance with Clause 2 of the agreement.

It was also agreed that the balance of the purchase price of RM5,034.15 was to be paid to Bank Pertanian to whom the land was charged at a later agreed date and upon such payment the 1st defendant would transfer the land to the plaintiff.

Upon the failure of the 1st defendant and his attorney to turn up on the agreed date and upon their failure to complete the transaction despite repeated requests, the plaintiff instituted an action for an order of specific performance of the agreement, damages for breach of contract in lieu or in addition to specific performance and costs.

The 1st defendant pleaded that he had a reasonable defence upon the merits and that is the plea of *non est factum* in that he did not know that the papers which he had signed with the 2nd defendant was a power of attorney empowering the 2nd defendant to sell his land and that the 2nd defendant had obtained his signatures by misrepresentation.

Held:

[1] The defence of *non est factum* failed for several reasons among them being the fact that the instrument in the nature of the Power of Attorney was signed, sealed and delivered in the presence of a Commissioner for Oaths of the High Court, at Alor Star who had endorsed at the back of the Power of Attorney a certification which declared that the 1st defendant

had acknowledged to him that "he is of full age and that he has voluntarily executed this instrument". In the circumstances the 1st defendant's averments that the said papers were signed in the 2nd defendant's house at night and the 1st defendant's signatures were obtained by the 2nd defendant on the 2nd defendant misrepresentation cannot be true.

[2] The Court was satisfied that the 1st defendant had failed to show that there was any triable issue in his purported defence.

[Plaintiff's application for summary judgment allowed.]

Cases referred to:
Bank Bumiputra Bhd. v. Majlis Amanah Rakyat [1979] 1 MLJ 23
Tong Lee Hua v. Yong Kah Chin [1981] 2 MLJ 1
Burns v. Kondel [1971] 1 Lloyd's LR 554
Wallingford v. Mutual Society [1880] 5 App Cas 685
Gallie v. Lee [1971] AC 1004

Legislation referred to:
Rules of the High Court 1980, O. 14, r. 1, O. 81, r. 1

Other source referred to:
English Supreme Court Practice, 1979, Vol. 1, p. 140, sub para. 14/3-4/5

For the plaintiff/applicant - Tan Beng Hong; M/s. Tan Beng Hong & Co.
For the defendant/respondent - Ong Gim Sem; M/s Syarikat Lim Kiam Hoon

JUDGMENT

Lim Beng Choon J:

In this ruling, I propose to deal only with the application of the plaintiff for summary judgment on the ground that the defendants have no defence on the merits of the case. I do not propose to deal with the interlocutory proceedings instituted by the defendant for leave to file a statement of defence out of time as the matter has been compromised.

Should there be an appeal with leave of this Court I shall deal with all the relevant matters in my written judgment.

This is an application made by the plaintiff by way of summons-in-chambers filed on 24 February 1986 (see encl. 29) for summary judgment on the ground that the defendants have no defence to the action commenced by Writ by the plaintiff. The application is made pursuant to O. 81 r. 1 of the Rules of the High Court.

The facts leading to the action out of which this application was made can be briefly stated as follows. The 1st defendant was said to have empowered the 2nd defendant with a Power of Attorney to deal with the piece of land held under Surat Putus Kechik (SPK) No. 9311 Lot No. 2965 Mukim Telui Kiri District of Kuala Muda Kedah comprising of 4 relongs 395 jembas (referred to as "the land") of which the plaintiff was the registered owner. The powers conferred on the donee includes the power to sell and to execute any conveyances instrument to effect the sale of the land. I may mention that at the hearing of this application, with the consent of both Counsel, the Power of Attorney was tendered as the plaintiff's Exhibit and marked "Pl". By a Surat Perjanjian dated 14 September 1981, made between the plaintiff and the 2nd defendant (see Exhibit "ZA-2") annexed to the affidavit affirmed by Zainal Abidin b. Jawi on 28 January 1986), the latter, as the attorney of the 1st defendant, agreed to sell to the plaintiff the land at a purchase price of RM10,034.15. Upon signing the Surat Perjanjian ("the Agreement") the plaintiff paid over to 2nd defendant a sum of RM5000 as part payment

of the purchase price in compliance with Clause 2 of the Agreement. Under Clause 2 of the Agreement the plaintiff was required to pay the balance of the purchase price of RM5,034.15 to Bank Pertanian to whom the land was charged. It was further agreed that the plaintiff could make the payment to Bank Pertanian at any time and upon payment of the sum to Bank Pertanian to clear the loan owed by the 1st defendant to Bank Pertanian, the 1st defendant would take steps to transfer the land to the plaintiff. It was agreed between the plaintiff and the attorney of the 1st defendant to finalise the sale and purchase of the land at the office of Bank Pertanian Alor Star at 10.00 a.m. on the 4 October 1981 but the attorney of the 1st defendant failed to keep the appointment. Repeated attempts were made to get the attorney to complete the sale and purchase agreement but without success. Finally on 19 October 1981 the plaintiff through his solicitors sent a notice of action by AR post to the 2nd defendant requiring him to complete the transaction at the office of the plaintiff's solicitors in Penang within 7 days effective from the date of the said notice. In the notice it was also mentioned that the plaintiff was prepared to pay off the sum owing to Bank Pertanian and a copy of the notice was sent to the said Bank. The said notice brought no response. The plaintiff then wrote to the 1st defendant on 24 February 1982 and 15 July 1982 requesting him to complete the transaction but likewise the 1st defendant failed to respond to the plaintiff's request. The plaintiff subsequently found out that the 1st defendant had sold the land to one, Boo Hock Soon @ Boon Choo Soon at a total purchase price of RM18,000. In the result the plaintiff instituted this action praying for an order of specific performance of the Agreement, damages for breach of contract in lieu or in addition to specific performance and costs.

The 2nd defendant, the attorney of the 1st defendant, has failed to enter an appearance and it is clear from his inaction that he was not prepared to defend the action.

In his statement of defence, the 1st defendant relies only on one plea to support his contention that he has a reasonable defence upon the merits and that is the plea of *non est factum*. However he admitted that the land was initially charged to Bank Pertanian and as he had defaulted payments to the Bank, a notice of demand of payments was issued by the Bank to him. He therefore approached the 2nd defendant to help him to raise a loan of RM5,000 to settle the outstanding payments due to the Bank. Whereupon the 2nd defendant agreed and asked him to sign some papers which he did. He further averred that the said papers were signed in the 2nd defendant's house and that he had no knowledge that the said papers related to a Power of Attorney empowering the 2nd defendant to sell the land. He then went on to assert that the 2nd defendant obtained his signature on the said papers by misrepresentation but he gave no particulars as to the nature of the misrepresentations made by the 2nd defendant. He however, does admit that he sold the land to Boo Hock Soon on 19 January 1983 for the sum of RM18,000. However there is one important admission made by the 1st defendant. In his affidavit affirmed on 26 February 1985, (see encl. 14), in support of his application for leave to file his defence out of time he asserted in para. 6(g) thereof that and I quote:

> In consideration of the 2nd defendant raising the loan to settle the loan to the Bank **I agreed to sell the land and upon the sale thereof I will pay him a reasonable amount for his services**.

This assertion was not repeated in his statement of defence. However that may be, as the said affidavit forms part of the case papers this Court can take into consideration this sworn assertion made by the 1st defendant in his affidavit. In this connection reference may be made to p. 140 of the *English Supreme Court Practice* 1979 Vol. L sub para 14/3-4/5 where it is stated:

> In deciding whether the defence set up is a real defence or not, all the circumstances must be looked at (per Bowen LJ *Blaiber v. Abrams* 77 LTJ 255 CA and see *Nassan Press v. Taylor* 70 LT 376.

Unfortunately the *Law Times Journal* and *Law Times* series are not available in this Court. Be that as it may, I do not think that this Court is precluded from considering the said sworn assertion of the 1st defendant. What weight should be placed on that assertion is a different matter.

It is common place that an application for summary judgment whether under O. 14(1) or O. 81(1) of the Rules of the High Court can be successfully resisted by a defendant if he can raise a *bona fide* triable issue i.e., a defence on merits - see *Bank Bumiputra Bhd. v. Majlis Amanah Rakyat* [1979] 1 MLJ 23, *Tong Lee Hua v. Yong Kah Chin* [1981] 2 MLJ 1, *Burns v. Kondel* [1971] 1 LR 554 Lloyd's and *Wallingford v. Mutual Society* [1880] 5 App Cas 685.

As regards to the plea of *non est factum* some instructive observations can be found in *Gallie v. Lee* [1971] AC 1004 where Lord Reid said:

> The plea of *non est factum* obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.
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> But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. **In general I do not think he can be heard to say that he signed in reliance on someone he trusted.** But, particularly when he was led to believe that the document which he signed was not one which affected his legal rights, there may be cases where this plea can properly be applied in favour of a man of full capacity.
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> **The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document**. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case.

Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser. That has always been the law and in this branch of the law at least I see no reason for any change.

(Emphasis is mine)

To my mind the excuses of the 1st defendant in support of his plea of *non est factum* are not dissimilar to the examples given in Lord Reid's speech. At any rate it is highly improbable that the 1st defendant did not know that the paper that he signed was an instrument in the nature of a power of Attorney. It was signed, sealed an delivered in the presence of one Othman b. Ismail, Commissioner for Oaths of the High Court at Alor Star. Furthermore the said Othman b. Ismail endorsed at the back of the Power of Attorney a certification which declared *inter alia* that the 1st defendant had acknowledged to him that "he is of full age and that he has voluntarily executed this instrument". In the circumstances the 1st defendant's averments that (i) the said papers were signed in the 2nd defendant's house at night and (ii) the 1st defendant's signature were obtained by the 2nd defendant on the 2nd defendant's misrepresentation cannot be true. Furthermore if the 1st defendant really did not know that he had signed a Power of Attorney and had no intention of giving the Power of Attorney to the 2nd defendant it is highly inconceivable that he would not have informed the plaintiff when the latter wrote to him on 24 February 1982 about the refusal on the part of the 2nd defendant to finalise the sale agreement. The plaintiff wrote to him twice and in the second letter dated 15 July 1982 he had reminded the 1st defendant about his participation in encouraging the plaintiff to sign the Agreement and to pay over the sum of RM5,000. It also reiterated the promise made by the 1st defendant to see that the sole transaction would be completed by mid-July 1982 (see Exhibit 'ZA5' attached to the affidavit of the plaintiff dated 28 January 1986). If the 1st defendant is really innocent and has no knowledge whatsoever of the Power of Attorney, his failure to respond at all to that letter is highly inconsistent with his claim.

For the above reasons I am satisfied that the 1st defendant has failed to show this Court that there is any triable issue in his purported defence.

Also found at [1988] 1 CLJ 384

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